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FUJITSU LIMITED, and
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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF GUAM

NANYA TECHNOLOGY CORP. and NANYA TECHNOLOGY CORP. U.S.A.,

Plaintiff,

vs.

FUJITSU LIMITED, FUJITSU MICROELECTRONICS AMERICA, INC.,

Defendants.

CIVIL CASE NO. 06-CV-00025

DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTIONS TO MAY 10, 2007 HEARING DATE ON MOTION TO IMMEDIATELY TRANSFER FOR CONVENIENCE

ORIGINAL

In the guise of "objecting" to the May 10, 2007 hearing, Plaintiffs seek reconsideration of the Court's May 1, 2007 Order (Dkt. No. 226) setting the briefing and hearing schedule on Defendants' Motion to Immediately Transfer. In their "objections," Plaintiffs argue the Court's Order was incorrect because of (1) the supposed "condensed time schedule" and (2) the "inability to conduct discovery regarding the issues raised." (Objections at 2). These arguments are without merit.

1. The "Objections" Are an Improper Reconsideration Motion

Plaintiffs' "objections" are truly a motion for reconsideration of the May 1, 2007 Order. However, L.R. 7.1(i) provides that a motion for reconsideration must identify:

> (1) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or,
>
> (2) the emergence of new material facts or a change of law occurring after the time of such decision, or,
>
> (3) a manifest showing of a failure to consider material facts presented to the Court before such decision.

Plaintiffs' "objections" are improper on their face because they do not satisfy this standard.

2. There Is No "Condensed" Schedule – Plaintiffs Disregarded the Rules, and Already Had Months to Brief the Issues (which They Already Briefed in California)

Plaintiffs' briefing schedule is not "condensed." Defendants filed their Motion to Immediately Transfer on April 17, 2007. Plaintiffs therefore were on notice of the need to timely file an opposition on May 1 -- two weeks after the motion was filed under Local Rule 7.1(d)(2)(A). Indeed, until the May 1 Order issued, PACER displayed the due date for the opposition as May 1. If Plaintiffs chose to take no action, they were assuming that risk and cannot now blame the Court for their derelictions. As recently as the April 23, 2007 hearing, the Court disregarded an untimely reply brief by Plaintiffs, putting them on notice of the need to ensure their filings were timely under the Local Rules. (*See* Dkt. No. 231 at 9.) *See also* L.R. 7.1(f) ("Papers not timely filed by a party . . . will not be considered . . . .").

Further, Plaintiffs objected to Defendants' efforts at the April 23 hearing to have the scheduling issue resolved before May 1, insisting that Defendants file a motion. (Dkt. No. 231 at 44). Had Plaintiffs been willing to discuss this issue with the Court then, they could have received clarification before the May 1 due date for their opposition. But Plaintiffs chose neither to prepare an opposition as required by the Rules, nor to obtain clarification in advance of their due date. Under such circumstances, they should not complain that the Court actually granted them two *additional* days (until May 3) in which to file an opposition.

Plaintiffs' claim of difficulty in preparing an opposition is not even credible. Defendants first moved to transfer back in December. (Dkt. Nos. 74 & 89). The Motion to Immediately Transfer raises a single new issue – the effect of *Sinochem* – which Plaintiffs already briefed in opposing Defendants' recent *ex parte* application. (*See* Dkt. No. 218). Indeed, Plaintiffs have already briefed the transfer issue as to whether Guam or California is a more convenient forum before the California Court. (*See* Dkt. No. 213 at Ex. B). Plaintiffs are obviously perfectly able to provide what response they have.

3. Plaintiffs' Assertions Regarding "Discovery" Are Red Herrings

Plaintiffs' claims regarding discovery (Objections at 2-3) are equally disingenuous. Again, Plaintiffs have been on notice with regard to the transfer issue since it was first raised in December 2006. And, Plaintiffs already managed to litigate the transfer issue in California without any need for the discovery they now claim is necessary to protect their constitutional right to due process. (*See* Dkt. No. 213 at Ex. B)

The fact is that there is no such thing as a "due process" right to discovery regarding a motion to transfer. Courts have granted motions to transfer in the midst of discovery without an issue of due process arising. *See X-Rail Sys., Inc v. Norfolk & W. Ry. Co.*, 485 F.Supp. 553, 555 (D.N.J. 1980) (motion granted in the midst of jurisdictional discovery); *see also Datasouth Computer Corp. v. Three Dimensional Techs, Inc.*, 719 F. Supp. 446, 454 (D.N.C. 1989); *Kahhan v. Ft. Lauderdale*, 566 F. Supp. 736, 740 (D. Pa. 1983).

The apparent showcase of Plaintiffs' discovery -- the purported subpoenas that Plaintiffs first sought to serve yesterday -- are not even proper; they seek, *inter alia*, the appearance of

witnesses located more than one hundred miles from the District Court of Guam. *See* Fed. R. Civ. Proc. 45(b)(2) (subpoenas must be served on witnesses within one hundred miles of the district from which it issued). In any case, this is not an evidentiary hearing and Plaintiffs have yet to identify a *single* disputed material fact. No witnesses or documents are in Guam. Two of the parties and all of their witnesses and documents are in the Northern District of California. All the likely experts and third party witnesses and their documents are much closer to the Northern District of California. These are the material facts regarding the transfer, and they do not require discovery.

The Plaintiffs also cite to the "convergence of critical deadlines" regarding jurisdictional discovery. (Objections at 2 n.1). But, if Plaintiffs were truly concerned about this issue, they could have raised it in opposing Defendants' *Ex Parte* Application filed on April 27. And, the burden caused by all of this jurisdictional discovery is one of the very reasons why hearing the Motion to Immediately Transfer now is the most efficient course.

Plaintiffs also again argue that Defendants' request for an immediate hearing of the transfer issue somehow "breaches" the parties' February 20, 2007 stipulation. This is not true. Defendant's Motion to Transfer is based upon a change in governing law that occurred after the stipulation, when the Supreme Court issued *Sinochem* on March 5, 2007. It makes no sense for Plaintiffs to insist that the Court defer immediate ruling on the venue transfer for the sake of completing potentially unnecessary jurisdictional discovery.

Lastly, Plaintiffs claim that Defendants "faile[ed] to comply with L.R. 26.2 and serve their pre-discovery disclosures." (Objections at 2). By Order of Judge Manibusan, those disclosures are not due until May 4. (Dkt. No. 171 at 2:20-22). Plaintiffs' assertion is blatantly false.

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For all of these reasons, Defendants respectfully ask that Plaintiffs' "objections" be overruled and denied.

Respectfully submitted this 3rd day of May, 2007.

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By: _____
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